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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-979

IRVING J. THORNE,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IRVING J. THORNE,

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—against—

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in the above case.

Opinions Below

The decision of the Court of Claims dismissing the petition herein is printed in the appendix hereto.

Jurisdiction

Judgment of the Court of Claims dismissing petition was entered October 16, 1972.

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Sec. 1255.

Question Presented

Is a veteran time barred from asserting a claim for total disability upon *de novo* evidence where his service-connected disability was not revealed until well after he was separated; but was wrongly diagnosed?

Statement of the Case

The petitioner is a medical doctor duly licensed to practice medicine in the State of New York, and enlisted in the active Naval Service of the United States on July 17, 1942.

On July 27, 1943 the petitioner was released from active naval service by reason of a finding by a medical board of a bilateral hernia, a mild left sacroiliac strain, and rheumatic myositis of the lumbosacral regions with fibrotic nodules within the muscles and beneath the fascia.

Petitioner suffered the aforesaid injuries while in the naval service; and, on December 29, 1943 his injuries were determined to be service-connected, though not pensionable by the Board of Veterans' Appeals.

A further application made on October 16, 1944 was denied on November 20, 1944; but, on further medical evidence presented August 27, 1945 the said Board determined that the injuries were compensable at a 20% rate.

Subsequently as a result of a worsening condition, the evaluation was revised upwards to 40% in 1947.

Plaintiff's condition has further worsened and presently is the basis of a claim for pension at a 100% disability rating; based on present medical proof which petitioner has sought to offer.

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The Court below has disallowed his claim as being time-barred, contrary to the authorities recited by the Court in previous and subsequent cases which hold that the statute of limitations is tolled where as here, the Board's decision is tentative and invites reopening as recited in *Friedman* v. *United States,* 310 F.2d 381 (1962) (p. 396 par. (c)).

Obviously the petitioner's claim cannot be time-barred, upon the aforesaid authority relied upon by the court below insofar as the action of the Medical Corrections Board herein in first denying, then allowing and thereafter revising upwards the petitioner's disability rating indicates and conclusively establishes that the board's decision has been tentative in improperly evaluating petitioner's disability status.

On this basis petitioner urges this honorable Court to review the decision of the Court of Claims which summarily dismissed your petitioner's rightful claim to 100% total disability veterans pension payments.

REASONS FOR GRANTING WRIT

1. The decision of the Court below is in conflict with decision of Court of Claims in *Versaci* v. *United States,* 403 F.2d 246 (1968); *Merson* v. *United States,* 401 F.2d 184 and *Beckham* v. *United States,* 392 F.2d 619, which held that the Court may take account of *de novo* evidence as to claimant's physical condition at time of release and thereafter in consideration of his disability claims.

2. The decision of the Court below is in conflict with decisions of the Court of Claims that a serviceman does not waive his claim for failure to apply for total disability

before his release from active duty. *Harper* v. *United States,* 310 F.2d 405 (1962); *Farrar* v. *United States,* 358 F.2d 965 (1965); *Grubin* v. *United States,* 166 Ct. Cl. 272, 333 F.2d 861 (1964) and *Woodward* v. *United States,* 167 Ct. Cl. 306 (1964); and that the claim is not time-barred by reason thereof.

3. The decision of the Court below is inconsistent with its decision in the case of *Friedman* v. *United States,* 310 F.2d 381, cited as a basis for denial of the petitioner's claim herein; where it was held that action by a corrections board is not final and the statute of limitations is therefore tolled where, as in this case, the petitioner is misled and, the correction board's decision is tentative and invites reopening.

The petitioner herein offered proof of his total disability and the Court below has erroneously denied his right to claim his pension by holding that it is time-barred.

ARGUMENT

The Court below erroneously held that petitioner was barred from proceeding with his law suit and his petition was dismissed on the authority of 28 U.S.C.A. §2501 of the Statute of Limitations.

The Court cited but one decision, *Fricaman* v. *United States, supra,* as authority for its holding against the petitioner.

There is a very clear and distinct conflict between the holding by the Court below and the holding in the *Friedman* case, *supra.*

This is not the only conflict. As will be briefly pointed out hereafter, there is also a conflict between the holding by the Court below in the instant case and the holdings in the cases both before and after the *Friedman* case, *supra,* decided November 7, 1962, in the following cases:

Versaci v. *United States,* 403 F.2d 246 (1968);
Merson v. *United States,* 401 F.2d 184 (1968);
Beckham v. *United States,* 392 F.2d 619 (1968);
Harper v. *United States,* 310 F.2d 405 (1962);
Farrar v. *United States,* 358 F.2d 965 (1965);
Grubin v. *United States,* 166 Ct. Cl. 272, 333 F.2d 861 (1964);
Woodward v. *United States,* 167 Ct. Cl. 306 (1964).

In all of the aforesaid cases, the Court held that an issue of fact was present which required factual determination as to whether or not the Statute of Limitations, 28 U.S.C.A. §2501, barred the action; whereas the Court below errone-

ously did not consider the factual issues and the extenuating circumstances presented but relied only on the limitation period.

In *Harper* v. *United States, supra,* the Court answered the question of time-bar in the negative; where the facts showed that Harper was separated from service in 1944 and suit was not instituted until 1959; the Court holding:

P. 407 [4]

"But the progressive deterioration of his condition after his return to civilian life and the discovery, in 1956, of a herniated disc showed that, in fact the true nature of his incapacity in 1944 was much more serious than a sprain or strain, and that the previous diagnoses were incorrect."

The record in this case clearly demonstrates that the diagnosis originally made by the medical board was incorrect, insofar as it was revised time and time again; and, petitioner presently finds himself permanently disabled as recited and his claim disallowed by reason of the errors of the Medical Corrections Board.

In *Farrar* v. *United States, supra,* Farrar was separated from service with disabilities wrongly attributed to other causes.

Farrar had suffered a herniated disc while in service, but a disc injury was not diagnosed until well after he was separated from service; as in the instant case. Just as petitioner herein, Farrar's symptoms were erroneously considered temporary and not disabling by the Medical Board; but, the Court held that (a) if the true facts of plaintiff's service-incurred condition (a ruptured disc of the cervical

spine) had been known at the time of his separation from the Army in 1945, he would have been entitled to disability retirement under the pertinent Army regulations; and (b) that the Board for the Correction of Military Records was arbitrary and unsupported by substantial evidence in refusing to grant plaintiff such entitlement on the basis of the materials he presented to that Board.

The *Grubin* case, *supra,* and the *Woodward* case, *supra,* all support this view.

The *Grubin* case, *supra,* is authority for the holding that one who maintained a successful suit for disability retirement pay was entitled to recover such from the time of his release from active duty.

Grubin had left active service in 1946 and brought his action in 1960, the Government claiming he was far out of time.

The Court said at page 862 [1, 2]:

> ". . . We have repeatedly held, however, that a cause of action for disability retirement pay does not accrue on the claimant's discharge; it does not ripen until he has had a competent board (or unsuccessfully sought one)."

On page 863, the Court in reviewing the factual situation in the delay involved in filing suit stated:

> "Plaintiff erred in thinking that his illness, whatever it was, was sufficiently moderate and controllable that he could return to his life as a surgeon; the fact is, as shown in finding 15, that he was soon forced to give up surgery and, then, general practice, and to become a

pathologist so that he could minimize stresses and regulate his activities, diet, and rest periods. The Army doctors were likewise mistaken in thinking that plaintiff's colitis was moderate and improving; the truth, as it now appears, was that the disease was merely quiescent toward the end of his service and flared up at frequent intervals thereafter."

The Court went on to hold that the Correction Board acted unlawfully, arbitrarily, or without substantial evidentiary support when it determined that insufficient material had been presented to indicate probable material error or injustice to plaintiff's case.

Because the present case is very much in point with Grubin's problem and petitioner is also a surgeon who is now faced with the problem of giving up his surgical practice, there should not and cannot be any time-bar to his claim for permanent 100% disability pay.

In the case of *Merson, supra,* the Court held at page 189 [2, 3]:

"Most recently, in the case of Brown v. United States, Ct. Cl. 396 F.2d 989, decided June 14, 1968, we held that in reviewing administrative service decisions, including those of Correction Boards as to 'substantial evidence' on military disability retirement pay cases, this court is not limited to the administrative record, and may take account of *de novo* evidence as to claimant's physical condition at the time of release and thereafter." (Emphasis supplied.)

To the same effect is the holding of the Court below in the *Versaci* and *Beckham* cases, *supra.*

CONCLUSION

In the interests of justice and to maintain the uniformity of the law respecting the petitioner's rights herein, it is respectfully prayed that this Honorable Court grant the petition herein.

Respectfully submitted,

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